

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 24 of 1992

WITH

CRIMINAL APPEALS NOS. 59 and 60 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and

MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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NANDIBEN MAHUBHAI

Versus

STATE OF GUJARAT

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Appearance:

Cr.Appeal No.24 of 1992

MR NAGIN N GANDHI for Petitioners

MR DP JOSHI,APP for State

Cr.Appeal No.59 of 1992

Mr.DP JOSHI,APP for appellant State

Mr.NN Gandhi for respondents

Cr.Appeal No.60 of 1992

Mr.DP Joshi,APP for appellant State

Mr.NN Gandhi for respondents.

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CORAM : MR.JUSTICE R.K.ABICHANDANI and

MR.JUSTICE K.R.VYAS

Date of decision: 25/06/1999

ORAL JUDGEMENT

Per:K.R.Vyas,J.

1. These appeals arise out of the judgment and order passed by the learned Additional Sessions Judge, Surat, in Sessions Case No.5 of 1990 dated 27.11.1991. By the said judgment, the original accused nos. 2 and 7 are convicted of offences punishable under section 304(2) and section 324 of IPC, respectively. The accused no.2 is sentenced to under R.I. for three years and to pay a fine of Rs.500/-, in default, to undergo S.I. for one month. Accused no. 7 is sentenced to undergo S.I. for one month and to pay a fine of Rs. 250/-, in default, to undergo further S.I. for 15 days. Besides these two accused, there were other five accused in the said Sessions Case. All the accused were charged for offences punishable under sections 143, 147, 148 and 149 of IPC. The accused no. 7 was also charged for offence punishable under section 326 or in the alternative, 324 of IPC. Similarly, accused nos.3,5 and 6 were also charged for offence punishable under section 323 of IPC. The accused nos. 2,4 and 5 were also charged for offence punishable under section 302 of IPC. All the accused were also charged for offence punishable under section 135 of the Bombay Police Act. As stated above, all the accused except accused nos. 2 and 7 were acquitted by the learned Sessions Judge of the offences for which they were charged.

2. Criminal Appeal No. 24 of 1992 is filed by the original accused nos.2 and 7 challenging the conviction and order of sentence imposed upon them while the State has filed Criminal Appeal No. 59 of 1992 for enhancement of sentence and Criminal Appeal No.60 of 1992 challenging the order of acquittal passed against the rest of the accused. All these appeals are conveniently disposed of by this common judgment.

3. The incident in question happened in the area of Bhandariwad of the City of Surat at about 7.00 p.m. on 4.8.1989 when Abubkar Gulamnabi Shaikh, PW 4 Ex.28 and his brother Mahmad Aiyas Gulamnabi, PW 5 Ex.30 were involved in a quarrel with the accused when a minor girl of accused no.3, while playing on the road, almost dashed against the scooter driven by Abubkar Gulamnabi, PW 4. There was heated exchange of words between PW 4 and the accused. On being informed by PW 5, the grandfather of PW 4 and 5, with other persons rushed to the spot. Commotion took place at that time and both the rival groups attacked each other with weapons. PW 4 sustained injuries at the hands of accused nos. 5,6 and 7 while Abdul Razak Pahelwan succumbed to the injuries caused by accused nos. 2,4 and 5. It is alleged that the accused no.2 hit the head of Abdul Razak Pahelwan with a brick

which ultimately proved fatal. All the accused have denied their involvement in the crime. However, accused no.1,2 and 3, in their additional written reply have come out with a say that 10 to 15 persons including deceased Abdul Razak came with deadly weapons and attacked accused nos. 1 to 7 and one Champa and caused injuries to them. Accused nos. 1,2 and 3, in their self-defence, also pelted stones on the unruly mob. It is quite possible that deceased Abdul Razak and others might have sustained injuries due to pelting of stones by the crowd or by the accused. In substance, the accused nos. 1,2 and 3 have taken the plea of self defence.

4. Mr.N.M.Gandhi, learned Counsel appearing for the accused, after having taken us through the entire evidence, submitted that the prosecution in the instant case, has failed to make out any case against the accused. Mr.Gandhi submitted that in view of number of discrepancies in the prosecution case, accused could not have been convicted even for the lesser offence and, therefore, the learned Sessions Judge has committed an error in convicting the accused nos. 2 and 7.

5. Mr.D.P.Joshi, learned APP, on the other hand, pointed out that the prosecution has successfully established the presence of all the accused forming an unlawful assembly, having common object to kill the deceased and/or to cause injuries to the prosecution witnesses and, therefore, all the accused ought to have been convicted of the offence punishable under section 302 of IPC, read with sections 143, 147, 148 and 149 of IPC.

6. The prosecution, in order to bring home the charge, has placed reliance on the evidence of Abubkar Gulamnabi Shaikh, PW 4, Ex.28, his elder brother Mahmud Aiyas, PW 5, Ex.30, his associate Farid Ahmed, PW 7 Ex.33 and one Yusufbhai Dabhoiya, PW 14 Ex.57 who are the eye witnesses in the case.

7. According to Abubkar, he and his brother Mahmud Aiyas, PW5 were returning home at about 7.00 p.m. on 4.8.1989 and was driving scooter. On seeing a girl playing at the corner of Bhandarivad, he applied brakes to avoid the accident. However, the girl raised shouts. The accused no.3, the mother of the girl, at that time, was sitting on the pan lorry. On hearing the shouts of the girl, the accused came there and started giving abuses to him. The complainant tried to pacify them by telling that the girl has not received any injury. However, the accused were excited who thereafter went

inside the house and came back with weapons. According to the complainant, accused nos. 1,5 and 6 were armed with iron rod, accused no.5 was armed with a hockey stick while accused no.6 was having a knife. All the accused attacked the complainant. The complainant alleged that the accused nos. 1 and 6 beat him with iron rods while the accused no.7 inflicted knife blows on his back. Accused nos. 2 and 3 caught hold of him and gave fist blows. In the meantime, the grandfather of the complainant one Abdul Razak and one Farid Ahmed tried to intervene. Accused nos. 4 and 5 inflicted hockey and iron rod blows on the person of Abdul Razak. The accused no.2 gave a hit to the grandfather of the complainant with brick on the head with the result, the grandfather of the complainant fell down on the ground and became unconscious. Accused no.6 inflicted a blow with iron rod on the legs of Farid Ahmad. Many people gathered and the accused thereafter ran away. According to the complainant, his grand father Abdul Rajak was shifted to the hospital for treatment. According to the complainant, Yusufbhai Dabhoiya was not present at the time of the incident. The complainant lodged a complaint before Athwalines Police Station thereafter.

28.6.1999:

8. The complainant has been cross examined at length. We frankly state that he has remained consistent with the story put forward by him in the examination-in-chief. Regarding the presence of Yusufbhai Dabhoiya, PW 14, the complainant has stated that at the time of incident, he had not seen PW 14. He has stated that he had last seen PW 14 at about 12.00 noon in meat market. According to the complainant, PW 14 had come one minute after the incident. Neither PW 14 asked him about the incident nor the complainant told PW 14 anything about the incident. The complainant has admitted that he did not inform PW 14 or any other person about the incident. He has further stated that before lodging the complaint, he did not talk about the incident to anybody. PW 14 took his grandfather to the hospital in minutes. According to the complainant, his grandfather was taken to hospital at about 7.05 hours. The complainant and his associate Farid Ahmed, PW 7 went towards the meat market. There, they waited for about 15 to 20 minutes. They reached police station at about 8.15 p.m. According to the complainant, the complaint was recorded by an officer like a Police Sub Inspector who took about 1.30 or 1.40 hours in recording the complaint, after having an interrogation for about 30 to 45 minutes. Even though PW 7 was present, the complainant alone was

interrogated. After lodging the complaint, he reached the hospital. The complainant has admitted that he and PW 7 were arrested on that night in connection with the complaint filed against them by accused Nandiben and Hansaben. He has further admitted that a chargesheet was filed for offences punishable under sections 147, 148, 149, 323, 324, 504 and 427 of IPC against him and other prosecution witnesses. He has denied the suggestion that on the day of the incident, at about 6.15 or 6.30 p.m., the prosecution witnesses attacked the accused with sword, stick, gupti, iron rods and stones. He has also denied that Ajij Ahmed, also known as Kalu, inflicted sword injury on the head of the accused Nandiben. He has denied the suggestion that his grandfather Abdul Razak was also an accused. He has also denied that he, his grandfather and other 15 to 20 persons had attacked the accused by pelting stones, bricks etc. Even though he has admitted that the bricks, stones were recovered in his presence by the police, he has later on denied the said suggestion. He has also denied that the accused also sustained injuries. He has admitted that he has stated in his complaint that he did not know as to who caused injuries to whom and who received injuries. However, he saw the accused having sustained injuries. According to the complainant, he received about 5 to 7 blows. His grandfather sustained head injury on account of brick blow and except the said injury, no other injury was caused by any other weapon. The complainant has stated that his grandfather received 4 to 5 strokes. His grandfather was inflicted brick blow when he was very near to him and he saw the same. According to the complainant, heated talks started at about 7.00 p.m. After receiving the first blow, the scooter was fallen down. His grandfather and PW 7 came when he was receiving blows at the hands of the accused. He has added that his brother Aiyas came with his grandfather and other persons. He clarified that Aiyas, PW 5 ran away at the time of quarrel and came within minutes with his grandfather. The complainant has admitted that there were about 12 to 15 persons. He did not remember the fact as to who inflicted the first and the last blow. He has denied the suggestion that his grandfather sustained head injury because he fell down on the footpath. He has admitted that he did not inform the doctor about the incident when he went to get the treatment. He also did not inform the doctor that they were beaten by sword, stick and knife. Even though he has given the name of the accused, he did not inform the doctor.

9. Mahmad Aiyas, PW 5, Ex.30, in his evidence, has corroborated the say of the complainant on material aspect. He has specifically stated that he ran away

while the quarrel was going on and no beating had taken place when he was with the complainant. In reply to the question, this witness has stated that when he returned to the spot with his grandfather, beating had already started. He has also admitted that both the sides received injuries. He has also corroborated the say of the complainant when he stated that accused Nandiben picked up a brick and hit the head of his grandfather. Regarding the presence of Yusufbhai Dabhoiya, PW 14, this witness has stated that PW 14 came after his grandfather fell down on the ground. He is not aware as to whether any of the witnesses talked to PW 14 about the incident.

10. The third eye witness is Farid Ahmed, PW 7, Ex.33. Since this witness has also more or less corroborated the say of the complainant, it is not necessary for us to reproduce his evidence. This witness has admitted in the cross examination that they were made to sit in the police station till 11.00 or 12.00 midnight after their complaint was recorded and thereafter they were sent to the hospital for treatment. He has also admitted that when they were at the police station, the other side came to the police station. He has also admitted that with respect to the said incident, a cross case was filed against them and they were released on bail. He has also admitted that Yusuf Dabhoiya, PW 14, Ex.57 came one minute after the incident and nobody informed him about the incident.

11. Reading the evidence of these eye witnesses, it is clear that the incident started on account of a very trivial issue. There was exchange of heated words initially between the parties. At the instance of Mahmed Aiyas, PW 5, a group of persons including deceased Abdul Razak came and then started free fight between the two rival sides with the result, both the sides sustained injuries. In view of the injury certificates on record, it is clear that the accused nos. 1,2 and 3 sustained injuries on their person. Ex. 26 is the certificate issued by Civil Surgeon, with respect to the injury sustained by accused Nandiben which shows that she sustained three injuries, one of them being an incised wound of 1' x 1'2 skin deep on the frontal area of head. Similarly, Ex. 27 also reveals that accdused Madhubhai sustained three injuries, one of them being 1/2" x 1/2" skin deep incised wound on the left nose. Ex. 25 is the certificate issued by the doctor with respect to the injury sustained by Hansaben who sustained two injuries. True, the complainant Abubkar also sustained three injuries, one being incised wound by sharp cutting instrument on back being 6' x 1.5" skin deep, but the

fact remains that both the sides involved therein. In view of the fact that the accused also sustained injuries of the nature of incised wounds, they are possible only by sharp cutting instruments. Therefore, the conclusion is that the prosecution witnesses were also having sharp cutting weapons with them and they also participated in the incident. If the evidence of eye witnesses is accepted on its face value, there is no option but to accept the prosecution case. However, this being a case of free fight arising out of a sudden quarrel without any motive, the case is required to be considered from this angle. It is the say of the complainant Abubkar, PW 4 that he and Farid Ahmed, PW 7 had reached Athwalines Police Station at about 8.15 p.m. and had filed a complaint at Ex. 29 before the said police station. The format of Ex. 29 reveals that the Athwaline Police Station received the FIR at 20.25 hours. Now, Yusuf Dabhoiya, PW 14, in his evidence, has stated that he and two boys of the locality took Abdul Razak in a rickshaw to Athwalines Police Station. According to him, the two boys went inside the police station, leaving PW 14 and injured Abdul Razak in a rickshaw. On being asked by police, they all went to civil hospital where the doctor examined the injured and they were informed to take injured to new civil hospital. Accordingly, they went to the new civil hospital. According to this witness, the duty constable Helanben Mithabhai, PW 9 Ex.38 was present there and after taking necessary information from PW 14, she made necessary entry in the register of Umra Police Station at 8.05 p.m. being Ex. 39 and also conveyed the message to Athwalines Police Station on telephone recorded by PSO Poonamchand Govindbhai. Poonamchand Govindbhai, PW 10, Ex. 47, in his evidence, has also stated that he had received telephonic message at about 8.05 p.m. and had entered the same in the station diary Ex. 48. Ex. 39 and Ex. 48 are verbatim same. Since Ex. 39 was recorded at earlier point of time, it is necessary to refer to the same. Ex. 39 states that one patient namely Haji Abdul Razak Haji Abduj Majid Banarasi, aged 80 years, residing at: Nanpura market, House No.1/2643, Surat, has been caused injuries at about 7.00 p.m. by (1)Madhu Dhanji (2) Nandi Madhu (3)Ranjanaben Madhu (4)Vasant Dhanji (5) Lallu Dhanjhi (6)Jayesh Bhandari, all residing at: Nanpura market, near his house, with hockey sticks and sword on his head and other parts of the body. He was taken to old civil hospital for treatment and from there, at the instance of Medical Officer, was taken to new civil hospital by Yusufbhai Dabhoiya, residing at:Badekha Chakla, Kadri Apartment, Flat No.2, Surat. The Medical Officer Dr.V.J.Barot, who examined the injured informed that he had expired and his

dead body was kept in the post-mortem room. From report Ex. 39, it is amply clear that the information about commission of a cognizable offence is disclosed by the lady head constable on duty at the instance of PW 14 Yusufbhai Dabhoiya wherein all the particulars regarding assailants, weapons, scene of offence and the timings are disclosed. True, Yusufbhai Dabhoiya, PW 14 came at the scene of offence one minute after the incident. It is the case of the complainant and other prosecution witnesses that they did not inform Yusufbhai Dabhoiya, PW 14 anything about the incident. In view of this, it was urged before us that Yusufbhai Dabhoiya, PW 14 could not have passed on the information to the lady head constable on duty at new civil hospital and in any case, Ex. 39 is a cryptic message conveyed to the police and, therefore, no importance can be attached to the same. It is not possible for us to accept the said submission. We are not prepared to accept the say of the complainant and other prosecution witnesses that they did not inform PW 14 about the incident. Assuming that PW 14 Yusufbhai Dabhoiya came after the incident was over, but before he took the injured in a rickshaw to the hospital, he would like to gather some information about the incident from the complainant as well as from the prosecution witnesses. It would be unnatural on his part to carry the injured in a rickshaw without getting any information from the complainant. Assuming that the complainant and other prosecution witnesses did not inform PW 14 about the incident, but in view of the fact that other two boys of the locality accompanied PW 14 in the rickshaw, it is quite probable that PW 14 must have received information about the incident. The fact that the two boys went inside the Athwalines Police Station leaving Yusuf Dabhoiya, PW 14 and the injured in rickshaw would go to show that they must be having information about the incident and must have conveyed the same to police which is not forthcoming. In any case, in view of entry Ex. 39 entered by Helanben, PW 9, in the register and having been conveyed to PSO Poonamchand, PW 10 of Athwalines Police Station who also, in turn, entered the same in the register, leaves no manner of doubt that the information received by the police was genuine and was recorded while performing their duties and, therefore, there is no question of doubting the same. If Ex.39 and Ex. 48 are accepted as the FIRs, there is no reason to treat the same as the complaint. In fact, on behalf of the complainant, at the time of trial, it was prayed to treat Ex. 39 as a complaint. However, the learned Sessions Judge, without deciding the said question, treated the complaint given by Abubkar Gulamnabi Shaikh, PW 4 at Ex.29 as the complaint. Reading the judgment, the



learned Sessions Judge has also observed that Ex. 39 cannot be treated as complaint because it was a cryptic message conveyed by Yusufbhai Dabhoiya, PW 14. In our opinion, the learned Sessions Judge has committed an error in not reading Ex. 39 as the complaint which was in earlier point of time than Ex. 29. Once Ex. 39 is treated as the FIR and the allegations made therein are accepted, it is clear that so far as accused no.2 is concerned, there is no allegation of accused no.2 hitting the head of deceased Abdul Razak with a brick. Similarly, accused no. 7 is not named in Ex. 39. Since both these accused are convicted of offence punishable under section 304 Part 2 and 324 of IPC respectively, by the learned Sessions Judge, in absence of any specific allegation against them in Ex. 39, their appeal is required to be considered in this view of the matter.

12. As stated above, reading the evidence of prosecution witnesses themselves, it is clear that there was a commotion resulting into free fight between the rival groups. Even as per the say of prosecution witnesses, it was not possible for them to know as to who was causing which injury with what weapon to each other. The stones and the bricks were pelted freely. Undisputedly, both the parties have sustained injuries. In these circumstances, it would be hazardous to accept the say of prosecution witnesses at its face value and to convict the accused. As stated above, the version of PW 14 neither involve accused no.2 having caused injuries with brick on the head of the deceased nor even refers to the presence of accused no.7 at the time of incident. Thus, even if the incident in question is believed to have taken place in the manner it is alleged, even then it is not possible for us to believe the role played by the accused. The accused no.2, in her further statement under section 313 of the Code of Criminal Procedure, pleaded the right of self defence by stating that stones were pelted on unruly mob and, therefore, it is possible that the deceased and others might have sustained injuries due to pelting of stones, which appears to us to be quite probable, though accused no.2 is not entitled to claim right of self defence as the case being of free fight. In view of what is discussed above, we feel that the accused nos. 2 and 7 deserve benefit of doubt and, therefore, the conviction and order of sentence passed against them is required to be set aside.

13. In the result, Criminal Appeal No.24 of 1992 filed by the appellants accused is allowed. The judgment and order passed against the accused convicting and sentencing them for offences punishable under sections

304(2) and 324 of IPC respectively, is hereby set aside.  
The fine, if any, paid by the appellants-accused to be  
refunded to them. The bail-bonds shall stand cancelled.  
Criminal Appeals Nos.59 and 60 of 1992 are dismissed.

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